

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MALCOLM WALKER,

Defendant-Appellant.

UNPUBLISHED

September 16, 2008

No. 279515

Wayne Circuit Court

LC No. 07-006716-01

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of a firearm, MCL 750.224f, possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b, and possession of a loaded firearm in a vehicle, MCL 750.227c. He was sentenced as a fourth habitual offender, MCL 769.12, to seven months for felon in possession of a firearm and twenty-six days for possession of a loaded firearm in a vehicle, to be served consecutive to a five-year prison term for felony-firearm. He appeals as of right. We affirm.

Defendant first argues that his trial counsel was ineffective. This issue is not preserved because defendant did not move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Therefore, this Court's review is limited to errors apparent from the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

To establish ineffective assistance of counsel, the defendant must show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense in that counsel's errors were so serious as to have deprived the defendant of a fair trial with a reliable result. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003), quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2502, 80 L Ed 2d 674 (1984). Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. *Hill, supra* at 138-139.

Defendant claims that defense counsel was ineffective because he failed to timely appear for trial following a recess. Defendant asserts that, because defense counsel's tardiness resulted in extending the trial to a second day, the jury was "clearly prejudiced" against defendant. We disagree. There is nothing in the record to support defendant's speculation that the jury was prejudiced against him because of his counsel's belated appearance. Moreover, the trial court specifically told the jury that defendant was not responsible for the delay in the proceedings, and it twice instructed the jury that it was to base its verdict solely on the evidence presented as well as that it should not let prejudice influence its decision. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005).

Defendant also asserts that counsel was ineffective for failing to call a *res gestae* witness. The failure to call witnesses or present evidence only constitutes ineffective assistance of counsel if it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of the proceeding. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record discloses only that counsel had been told by defendant's sister that an eyewitness existed but did not know the person's name. The record is silent with regard to the substance of the alleged eyewitness's testimony. Under these facts, it cannot be said that counsel's failure to call additional witnesses deprived defendant of a defense that might have made a difference in the outcome of the trial. See *id.*

Defendant next asserts that counsel was ineffective for failing to call him as a witness after stating in opening remarks that he would testify. However, after defendant presented its sole witness, defense counsel informed the court that defendant had "decided that he does not want to testify." When the trial court inquired, defendant confirmed that he did not wish to testify and stated that it had been his decision. Thus, the record reflects that defendant knowingly made a decision not to testify. Defense counsel was not ineffective because defendant changed his mind about testifying. Furthermore, the trial court specifically instructed the jury that it was not to consider the fact that defendant did not testify. Jurors are presumed to follow their instructions. *Graves, supra*; *Bauder, supra*.

Defendant requests that this Court remand for an evidentiary hearing on the issue of ineffective assistance of counsel and the appointment of an investigator in order to allow him to develop his claim of ineffective assistance of counsel. However, because defendant did not file a motion to remand in accordance with MCR 7.211(C)(1) and has not set forth any additional facts that would require development of a record to determine if defense counsel was ineffective, we conclude that the relief sought by defendant is not warranted. See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

In his second issue, defendant asserts that the trial court abused his discretion by allowing the jury to know that defendant's attorney was responsible for extending the trial to a second day. However, defendant has effectively abandoned this issue by providing little or no argument or authority in support of this assertion of error. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue without citation of supporting authority. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). In any event, the issue is without

merit. The jury could not have failed to notice defense counsel's absence from the courtroom, particularly when the prosecutor and defendant were both present and waiting for the trial to start. The trial court's comments with regard to the situation were both limited and restrained. Moreover, the court specifically emphasized to the jurors that the delay was not attributable to defendant. Defendant was not deprived of a fair trial.

We affirm.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio